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Judicial Interpretation of Written Rules

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JUDICIAL INTERPRETATION OF WRITTEN RULES*

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If there is a legal term with multiple meanings,[1] it is the word "interpretation." As a first and very broad definition, the term "interpretation" can be considered as synonymous with "the function of the jurist,"[2] whose task consists entirely of interpreting. This definition, used exclusively by legal philosophers, is not the one which we shall follow here. A second and much more widespread meaning of the word "interpretation" refers to the activity of the judge who, on the one hand, attempts to determine the scope of an ambiguous or obscure text and, on the other hand, attempts to elaborate a solution when the text presents a gap.[3] Despite appearances, these are two distinct intellectual functions which should not be confused by including them under the single concept of "interpretation."[4] In reality, both interpreting the law and filling the gaps of the law are related to a more general notion which constitutes their common denominator—that of the application of the rule of law.[5] Thus, it is fitting to eliminate the hypothesis of silent law; additionally, the very title of the subject, interpretation of written rules, calls for this elimination. The term "interpretation," therefore, will be taken here in its narrow definition of "determining the meaning of a text," whether it be with regard to a statute or a regulation. In fact, as it has been said, "[f]rom a given text, a single meaning must be considered as correct, and it is in the search for this one meaning that interpretation is properly engaged."[6]

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1. The plurality of meaning also exists in everyday language. *See* 4 E. LITTRÉ, DICTIONNAIRE DE LA LANGUE FRANÇAISE *Interprétation* (1969).

2. *See* Villey, *L'interprétation dans le droit*, *in* 17 ARCHIVES DE PHILOSOPHIE DU DROIT 3 (1972), where it is stated that "[t]he function of the jurist can be called interpretation."

3. *See, e.g.*, 1 A. WEILL, DROIT CIVIL n° 186 (3d ed. 1973). *See also* F. GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW (2d ed. La. St. L. Inst. trans. 1963).

4. *See* 1 C. AUBRY ET C. RAU, DROIT CIVIL FRANÇAIS n° 171 (7th ed. 1964).

5. *See* 1 G. MARTY ET P. RAYNAUD, DROIT CIVIL n° 128 (2d ed. 1956). *See also* 4 E. BACH, ENCYLOPÉDIE DALLOZ–DROIT CIVIL *Jurisprudence* n^{os} 90-145 (1973), which distinguishes stricto-sensu interpretation from filling in the gaps.

6. C. AUBRY ET C. RAU, *supra* note 4, at n° 169.

The institutions likely to interpret the law are various.[7] In the first place, one can think of the *legislator* himself to be in an excellent position to determine the meaning of those statutes which he authored. The system devised after the revolution had, indeed, created the device of the *référé législatif*, whereby difficulties of interpretation arising in the course of a trial were submitted to the legislator. This system, however, failed and was discarded in 1837. Nevertheless, today's legislator still has the authority to enact statutes of interpretation in order to throw light on the provisions of a previously passed statute considered obscure; but, in practice, such statutes are rare and play no real role.

Interpretation can also be the work of the *administration* and take the form of administrative circulars and ministerial responses to written questions of parliamentarians. These two modes of interpretation show an incontestable tendency of becoming more prevalent today.[8] It is true that the *Cour de cassation* refuses to attribute any binding force to the ministerial circulars[9] and quite often reminds trial courts that these circulars cannot impose on them the meaning and scope of the provisions interpreted by the circulars.[10] As for the ministerial response to written questions from parliamentarians, the *Cour de cassation* has always admitted that the response constitutes only a simple advisory opinion which does not bind the judge in any way. Without a doubt, however, reality is different; the interferences between administrative and judicial interpretations are evident.[11] Indeed, both the power of interpretation and the duty under article 4 of the *Code civil* to interpret written rules belong mainly to the *judges*, so much so that the writers do not hesitate to speak of "the pre-eminence of judicial interpretation."[12] Therefore, judicial interpretation will be the only mode of interpretation with which we shall concern ourselves herein.

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7. *See* 1 J. GHESTIN ET G. GOUBEAUX, TRAITÉ DE DROIT CIVIL n^{os} 319-29 (1977); G. MARTY ET P. RAYNAUD, *supra* note 5, at n° 130.

8. On the explanation of this phenomenon, especially on that which concerns written questions, *see* Oppetit, *Les réponses ministérielles aux questions écrites des parlementaires et l'interprétation des lois*, D.1974.Chron.107.

9. The *Conseil d'Etat* has adopted a less definite position. *See* J. GHESTIN ET G. GOUBEAUX, *supra* note 7, at n° 324.

10. *See, e.g.*, Judgment of 23 juin 1976, Cass. soc., [1976] Bull. Civ. n° 394; Judgment of 26 juin 1974, Cass. soc., [1974] Bull. Civ. n° 392; Judgment of 15 nov. 1972, Cass. civ., [1972] Bull. Civ. n° 614; Judgment of 9 oct. 1972, Cass. com., [1972] Bull. Civ. n° 242; Judgment of 28 avril 1966, Cass. civ., [1966] Bull. Civ. n° 501; Judgment of 14 déc. 1965, Cass. civ., [1965] Bull. Civ. n° 706.

11. For enlightening proof, *see* Oppetit, *supra* note 8.

12. J. GHESTIN ET G. GOUBEAUX, *supra* note 7, at n° 321. *See also* G. MARTY ET P. RAYNAUD, *supra* note 5, at n° 130.

In contrast with certain more modern foreign codes, the *Code civil* does not formulate any principles for the interpretation of laws. Several writers in the past had admitted by analogy the application therein of codal provisions relative to the interpretation of contracts[13] on the ground that with both laws and contracts, it was a matter of interpretation of intentions.[14] This approach was very much contested and does not appear to have any proponents today; in fact, the bringing together of the statute, considered as the expression of a general will, and of the agreement, envisaged as the expression of the will of the parties, is more than artificial.[15] That analogies are possible between the two mechanisms is not deniable,[16] but one cannot reasonably draw any rules on interpretation of written norms from these articles.[17]

In the silence of the Code, the problem of methods of interpretation became the subject of abundant legal literature. Certain of the numerous published works, beginning with the *Méthode d'interprétation et sources en droit privé positif (Method of Interpretation and Sources of Private Positive Law)* of Dean François Gény, have remained famous. One must admit, however, that the works in question were only successful with legal theoreticians; the courts, on the contrary, remained closed to the suggestions contained in these works.[18] This is not to say that judges do not employ certain methods for interpreting the law; judges simply do not accord the same importance, as does doctrine, to this problem. It has been said that "doctrinal controversies do not appear in judicial decisions."[19]

In truth, it is often very difficult to find, through the framework of a decision, the precise reasoning followed by the judge. It has often been stressed that French judgments and decisions do not explicitly offer

> responses to the problem of the *methods of interpretation* and, more particularly, to the choice between the numerous methods which exist. Why was one text strictly construed and another liberally construed? Why, with respect to the same provision,

13. *See* C. CIV. arts. 1156-64 (Fr.).

14. 1 C. AUBRY ET C. RAU, DROIT CIVIL FRANÇAIS § 40 & n.2 (6th ed. 1936). 1 G. BAUDRY-LACANTINERIE ET M. HOUQUES-FOURCADE, DES PERSONNES, *as contained in* 3 G. BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL n° 256 *bis.* (2d ed. 1902).

15. *See* C. AUBRY ET C. RAU, *supra* note 4, at n° 169.

16. *See* 1 J. CARBONNIER, DROIT CIVIL n° 39 (10th ed. 1974). Batiffol, *Questions de l'interprétation juridique, in* 17 ARCHIVES DE PHILOSOPHIE DU DROIT 12-13, 21 (1972).

17. *See* C. CIV. arts. 1156-64.

18. *See* G. MARTY ET P. RAYNAUD, *supra* note 5, at n° 130 *bis.*; 1 H. MAZEAUD, J. MAZEAUD ET L. MAZEAUD, LEÇONS DE DROIT CIVIL n° 110 (5th ed. 1972).

19. G. MARTY ET P. RAYNAUD, *supra* note 5.

> has the jurisprudence shifted from the first approach to the second approach? The commentator often ponders over these attitudes and comes up only with guesses as responses.[20]

Therein lies a great difference with the judicial decisions of the common law countries, of which it has been said that "jurists who read the decision understand why it was so rendered."[21] Therefore, eminent writers have recently asked the French courts, especially the *Cour de cassation*, to justify their decisions in a more explicit manner.[22] It is feared, however, that, considering the traditions and habits of the court, this request is simply wishful thinking.[23]

It is not an exaggeration to say that, in the matter of interpretation of written rules, all or nearly all pose a problem and nothing is definitely clarified. Indeed, the reading of doctrinal works may communicate a different impression; but confrontation with the raw material of judicial decisions does not cease to give rise to perplexity. The jurist is thus called upon to ask himself the following two questions of logical, but unequal, importance: (1) *When* does interpretation take place? and (2) *How* does interpretation take place? This dual questioning may seem commonplace, and undoubtedly it is. However, the answers that can be supplied are far from being satisfactory to a mind concerned with certainty.

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20. Batiffol, *supra* note 16, at 15-16. *See also* Boulanger, *La méthode depuis le Code civil de 1804 au point de vue de l'interprétation judiciaire, in* TRAVAUX DE LA SEMAINE INTERNATIONALE DE DROIT, PARIS, 1950 at 331 (1954). "[T]he interpreter must not only expose but reformulate this reasoning. An elementary intellectual integrity requires that we recognize that there exists in the subject of our study something unalterably conjectural." *Id.* at 343-44.

21. Touffait et Tunc, *Pour une motivation plus explicite des décisions de justice notamment de celles de la Cour de cassation*, 72 REV. TRIM. DR. CIV. 487 (1974) [REVUE TRIMESTRIELLE DE DROIT CIVIL] (Fr.).

See also Barham, *La méthodologie du droit civil de l'Etat de Louisiane*, 1975 REV. INT. DR. COMP. 797 [REVUE INTERNATIONALE DE DROIT COMPARÉ] (Fr.). Former Justice Barham, speaking of these jurisprudential decisions of his state, says:

> Most practitioners remain attached to long decisions which greatly develop the foundations of law and the reasoning that inspired the decision of the court . . . . At the very moment when Professor Tunc declared himself a supporter of more explicit decisions on the part of French courts, it appears to us that one of the important functions of a judge is to describe the method by which he arrives at his decision in a given case.

Barham, *supra*, at 810.

22. Touffait et Tunc, *supra* note 21.

23. The article of Touffait and Tunc has received approval of its principle, but with several qualifications. *See* Lindon, *La motivation des arrêts de la Cour de cassation*, J.C.P.1975.2681. The article has also received opposition to its principle. *See* Breton, *L'arrêt de la Cour de cassation, in* 23 ANNALES DE L'UNIVERSITÉ DES SCIENCES SOCIALES DE TOULOUSE 5, 22 (1975).

THE DOMAIN OF INTERPRETATION

Judicial interpretation consisting of determining the meaning of a text is permitted only where the text is obscure, ambiguous, or simply vague. Such is, in fact, the principle formulated by jurisprudence and doctrine; the principle, however, admits of some derogations.

The Principle

Interpretation stops when a text is clear: *interpretatio cessat in claris.* Numerous writers consider that this maxim still continues to be valid. It leads to denying all power of interpretation to the judge when he is faced with a clear and precise text.[24] The jurisprudence, in fact, follows this pattern and refuses, in principle, to find out whether the legislative intent might have been different from what is clearly expressed in the text. This jurisprudential tendency is evident from reading the following in a decision:

> Whereas the Court is presented with a text whose clarity and precision do not permit the Court to interpret it as the party would have the Court do, even if it is likely that its draft does not correspond to the real legislative intent; whereas, to grant to the Courts the possibility, under pretext of interpretation to modify or restrict the import of a statute which is not ambiguous and is sufficiently comprehensive would amount to authorizing the judge to substitute himself for the legislator.[25]

When utilizing this power of interpretation for obscure and ambiguous texts, the jurisprudence particularly makes recourse to preparatory works. In fact, a long line of decisions has established:

> [I]f, in principle, recourse to preparatory works is permitted when a text requires interpretation, the judge, to the contrary, must refrain from recourse to preparatory works where the meaning of the law such as it appears in the draft is neither obscure nor ambiguous, and consequently, must be looked upon as certain.[26]

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24. *See* C. AUBRY ET C. RAU, *supra* note 4, at n° 169; G. BAUDRY-LACANTINERIE ET M. HOUQUES-FOURCADE, *supra* note 14, at n° 236; 1 R. BEUDANT ET P. LEREBOURS-PIGEONNIÈRE, COURS DE DROIT CIVIL FRANÇAIS n° 185 (1934); H. MAZEAUD, J. MAZEAUD ET L. MAZEAUD, *supra* note 18, at n° 110. *See also* the formula contained in the Project of the Year VIII: "When the law is clear, the letter is not to be disregarded, under the pretext of pursuing its spirit." PRELIM. BOOK tit. 5, art. 5, cl. 1.

25. Judgment of 21 oct. 1946, Riom, D.1947.1.90 note Carbonnier.

26. Judgment of 22 nov. 1932, Cass. civ., D.H.1933.2. *See also* Judgment of 21 nov. 1898, Cass. req., S.1899.1.193 note Wahl; Judgment of 20 oct. 1891, Cass. civ., D.1892.1.57 report by Greffier, J.; Judgment of 4 juin 1889, Cass. civ., D.P.1890.1.351; Judgment of 9 jan. 1947, Paris, D.1947.2.141; Judgment of 10 avril 1935, Angers,

Putting the adage *interpretatio cessat in claris* into practice, however, is a delicate operation. As shown by recent works on juridical logic, it is extremely difficult to know when a text is clear. No criterion for clarity imposes itself a priori; and, as a writer has seen fit to affirm, "to say that the text is clear is to stress the fact that, under the circumstances, it is not debated."[27] Nevertheless, that does not mean that it reasonably might not be.

Thus, one cannot speak of a clear text when the legislator uses vague terms, the content of which must be determined by the judge on a case by case basis. Article 287 of the *Code civil* provides that, following divorce, custody of the children is awarded to either one of the parents, *according to the best interest* of the children. It goes without saying that such a formulation obligates the judge to proceed with an over-all view of the situation, which can lead to granting custody to either the mother or the father. Similarly, article 1397 of the *Code civil* permits spouses to modify their matrimonial regime by agreement "*in the interest of the family.*" These words cannot be defined in a singular fashion, and the *Cour de cassation* itself is not in a position to give them an all-inclusive definition. Indeed, in a notable decision of January 6, 1976,[28] the Court enunciated the following general guideline: "The existence and the legitimacy of the interest of the family must be the object of comprehensive determination, the sole fact that one of the members of the family would risk being hurt should not necessarily prohibit the modification or change contemplated." The precision supplied is incontestably important since the Court indicates to lower court judges that, in the interpretation of article 1397, *the interest of the family* may turn out to be the interest of *only one* of the family members; the fact remains that in each instance the judge must make a concrete determination as to whether the legal condition has been satisfied. One can, therefore, say that the adage *interpretatio cessat in claris* can never be invoked where the draftsman has intentionally used a general clause or formulation.

S.1935.2.222; Judgment of 12 jan. 1927, Nancy, Gaz. Pal. 1927.1.295; Judgment of 21 mars 1925, Trib. civ., Strasbourg, Gaz. Pal. 1925.1.680; Judgment of 7 juill. 1897, Orléans, D.P.1898.2.143.

One cannot fail to make a comparison with the theory of the erroneous interpretation (*dénaturation*) of clear and precise clauses, adopted by the *Cour de cassation* with regard to interpreting juridical acts and, more particularly, agreements.

27. C. PERELMAN, LOGIQUE JURIDIQUE—NOUVELLE RHÉTORIQUE n° 25 (1976). *See* Perelman, *L'interprétation juridique, in* 17 ARCHIVES DE PHILOSOPHIE DU DROIT 29-30 (1972). *See also* Kalinowski, *Philosophie et logique de l'interprétation en droit, in* 17 ARCHIVES DE PHILOSOPHIES DU DROIT 39-42 (1972).

28. Judgment of 6 jan. 1976, Cass. civ., D.1976.1.253 note Ponsard. *See* Nerson, *Jurisprudence française en matière de droit civil—Personnes et droits de familles*, 1976 REV. TRIM. DR. CIV. 537 n° 1.

A text perfectly clear in meaning from the standpoint of ordinary language may not be so from the juridical standpoint. Thus, article 333 of the *Code civil* allows the conferring of the benefit of legitimation by authority of law upon the child whose status is that of an illegitimate child "if it appears that marriage is *impossible* between the two parents." "Impossible," in ordinary language, means "that which cannot be done."[29] In effect, the jurisprudence has acknowledged very logically that this condition is fulfilled in those cases where the parents cannot marry by reason of an obstacle, objective and beyond their control, such as the death of one of them.[30] Additionally, however, there exist jurisdictions which consider that, according to the *ratio legis*, the meaning of the term "impossible" could not be the usual meaning and that the impossibility in the sense of article 333 encompasses both hypotheses, where the parents cannot marry and where the parents do not want to marry. Thus, in a decision of December 7, 1976,[31] the *Cour de Paris* did not hesitate to declare: "The law, which has not distinguished between the various causes of impossibility, leaves to the judge the task of appraising, case by case, if, under the circumstances, marriage must be considered impossible." This broad conception leads to permitting legitimation by authority of law in cases where one or both parents refuse to contract marriage. The word "impossible," then, takes on a very special connotation.

This exemplifies the difficulty of putting into practice the principle that interpretation stops when a text is clear. To the extent that the clarity of a written rule is decided by the judge himself, it suffices for him, in order to exercise the power of interpretation, to pretend that there exists an ambiguity or an obscurity. Only the *Cour de cassation*, through its regulatory function of jurisprudence, can then correct possible excesses, if it at least considers it to be necessary. Thus, not only does the principle *interpretatio cessat in claris* lack scientific rigor; but it also suffers true derogations.

The Derogations

As a premise, we assume that the judge finds himself with a clear text which, therefore, he ought to apply purely and simply; and yet, he embarks upon an interpretation. These cases are of two

29. E. LITTRÉ, *supra* note 1, at *Impossible*.

30. *See* Judgment of 13 juin 1973, Trib. gr. inst., Strasbourg, D.1974.69 (4th cahier) note Colombet.

31. Judgment of 7 déc. 1976, Paris, D.1977.1.297. *See* Nerson, *Jurisprudence française en matière de droit civil—Personnes et droits de famille*, 1977 REV. TRIM. DR. CIV. 764 n° 4; Raynaud, *Jurisprudence française en matière de droit civil—Personnes et droits de famille*, 1977 REV. TRIM. DR. CIV. 549, n° 2.

types; while the first type may be considered as normal, the second type is much more dangerous because it threatens to empty the principle *interpretatio cessat in claris* of its very substance.

It is commonly acknowledged by the predominant doctrine and jurisprudence that, in the presence of a clear text, the judge is granted once again his power of interpretation when it is appropriate "to give meaning to a text inapplicable in its letter or rectifying an evident material error."[32] This is the idea expressed as follows by the *Tribunal civil de la Seine:*

> Whereas all search for legislative intent by means of interpretation is forbidden to the judge where the meaning of the statute as it reads is neither obscure nor ambiguous, and consequently must be regarded as certain . . . there is an exception only *if the application of the text resulted in some absurdity.*[33]

Absurdity can arise either from a material error in drafting[34] or from antinomic and irreconciliable provisions within the same text. The typical example is that of article 1112 of the *Code civil.* The first paragraph of article 1112 requires that the violence capable of giving rise to annulment of a contract be "of a nature to make an impression on a reasonable person" so as to make him fearful of considerable harm, while the second paragraph provides that consideration be given "to the age, sex, and condition of the persons." In the presence of these two antinomic modes of determination, the jurisprudence has allowed the subjective criterion of the second paragraph to prevail, in accord with its general conception of the vices of consent. If the power of tribunals to eliminate the absurdities and antinomies of written rules cannot be seriously contested, one may, however, hesitate in the second type of derogation.

More and more frequently it happens that, despite the clear character of a text, the text is interpreted in order to confer upon it a different meaning from that intended by the legislator. This is a clear abandonment, pure and simple, of the principle *interpretatio cessat in claris.* An illustration of this phenomenon can be found in the recent jurisprudence concerning the petition to contest the paternity of the husband provided for by a series of articles in the *Code civil* beginning with article 318. The result from these texts is that the mother can contest the paternity only for the purpose of legitimation, which supposes the dissolution of the first marriage of

32. C. AUBRY ET C. RAU, *supra* note 4, at n° 169.

33. Judgment of 24 avril 1952, Seine, J.C.P.1952.2.7108.

34. Judgment of 8 mars 1930, Cass. crim., D.1930.1.101 note Voirin.

The example on point, even though foreign to the civil law, is that of the decree concerning the rules and regulations of railways, which forbade passengers from boarding or alighting *when the train is completely stopped*!

the mother and her marriage to the alleged father. In order for legitimation to be effected, the child must also possess the status of being the common child of the mother and the second husband, as attested to by the express reference made by articles 318(1) to 331(1). In the presence of these texts, corroborated moreover by the opinion of the reporter of the bill before the National Assembly, the lower courts have, for several years, denied the action contesting paternity in the absence of proven possession of status.[35] However, in spite of the texts and the preparatory works of the statute, the *Cour de cassation* has censured their application and has held in two decisions of February 16, 1977,[36] that the articles alluded to nowhere required that the child possess the status of being the child of his mother and the second husband. These decisions caused a great commotion; and an eminent writer did not hesitate to speak of the "erroneous interpretation (*dénaturation*) of the statute by the *Cour de cassation*,"[37] especially since the high court did not deign to indicate reasons for its position. The effect of such jurisprudence is perplexing. One may attempt to find an explanation in the notion of "social insufficiency" of the law, suggested by a writer[38] not long ago: "A text of a law is there, but . . . [it] leads to a solution which the judge considers bad or simply maladjusted."[39] As a consequence, the judge deviates from the text in order to arrive at a result which he considers more satisfactory. This explanation undoubtedly enables one to account for the many distortions that the jurisprudence imposes on texts a priori clear. However, the concept of "social insufficiency of the law" can be criticized as being particularly vague; one departs from the domain of the rational and the foreseeable to venture into the domain of "juridical policy" in its most subjective state. Moreover, if one can speak of "social insufficiency" with respect to old statutes which must be adapted to the modern social order, such a value judgment appears to be excessive when it is applied to statutes which date back only a few years.

In short, concerning the "domain" of interpretation of written rules, the prevailing impression is that of a very great flexibility, if not a great uncertainty. On the one hand, the courts regularly recall to mind that there is no place for interpretation of a clear text and,

35. *See, e.g.*, Judgment of 16 avril 1975, Trib. gr. inst., La Rochelle, D.1975.715 (40° cahier) note Huet-Weiller; Judgment of 31 mai 1976, Orléans, J.C.P.1977.2.18663, 3d case.

36. Judgment of 16 févr. 1977, Cass. civ., J.C.P.1977.2.18663; Judgment of 16 févr. 1977, Cass. civ., D.1977.1.328 note Huet-Weiller; Raynaud, *supra* note 31, at 317, n° 4.

37. Mazeaud, *Une "dénaturation" de la loi par la Cour de cassation*, J.C.P.1977.1.2859.

38. Boulanger, *supra* note 20, at 337, 344.

39. Boulanger, *supra* note 20, at 344.

therefore, are respectful of the adage *interpetatio cessat in claris.* On the other hand, one must not be deceived by the import of the principle. First of all, the notion of "clarity" is itself equivocal. Undoubtedly, if article 494 of the *Code civil* provides that "guardianship may be opened for an emancipated minor as for an adult," the need for interpretation is non-existent; similarly, if article 36 of the statute of July 24, 1966, specifies that "the number of partners [*associés*] of a limited company [*société à responsabilité limitée;* S.A.R.L.] may not exceed fifty (50)," all interpretation is useless. But how numerous are the terms and formulas which the jurisprudence considers as ambiguous or obscure, thus necessitating an interpretation? Have we not recently seen the Plenary Assembly of the *Cour de cassation*[40] ponder over the expression "number of voters" utilized by an article of the Labor Code [*Code du travail*] in order to find its meaning? Here is, however, an expression devoid of all ambiguity a priori! And then, supposing even that a text is considered to be clear by the majority opinion, nothing prevents a jurisdiction, and more especially the *Cour de cassation,* from proceeding with its interpretation in order to arrive at a result which it considers preferable. In brief, a cloud of haziness surrounds the domain of interpretation. That is an observation which, at first sight, does not apply to the methods of interpretation.

THE METHODS OF INTERPRETATION

Doctrine willingly distinguishes "methods of interpretation" from "techniques or rules of interpretation,"[41] adding sometimes that "if the principles of this method are lively debated, the practical rules are less lively debated."[42] In reality, under the term "rules of interpretation," the writers study primarily the maxims bequeathed to modern law by jurists of the Middle Ages.[43] In truth, these maxims concern the application of the rule of law to concrete cases—namely, the determination of its domain of application, and not its interpretation, *viz,* the determination of its meaning. The best proof of this is that these maxims come into play in a general manner even when a text is perfectly clear.[44] Therefore, we will only

40. Judgment of 2 déc. 1977, Cass. ass. plén., D.1978.1.69 Concl. Premier av. gén. R. Schmelck.

41. A. WEILL, *supra* note 3, at n° 186-94.

42. J. CARBONNIER, *supra* note 16, at n° 37.

43. Examples of these maxims are *exceptio est strictissimae interpretationis* (exceptions must be strictly construed) and *generalis specialibus non derogant* (general provisions do not derogate from special provisions).

44. See G. BAUDRY-LACANTINERIE ET M. HOUQUES-FOURCADE, *supra* note 14, at n° 264.

examine the methods or techniques available to the judge for determining the meaning of a statute or a rule.

It is to be remembered at the outset that, in contrast to certain foreign countries,[45] France does not have strict canons of interpretation and that the *Cour de cassation* has never defined the various techniques to be used in determining the meaning of a text; neither has the Court specific instructions for their use or a hierarchy among them. Nevertheless, if one attempts to make a synthesis, one perceives that two factors are predominant: on one side, it is the formula of the written rule itself; on the other side, it is the purpose of the rule. Interpretation is articulated around one or the other of these elements.

The Formula

As an initial premise, we assume that the judge finds himself in the presence of a written rule. It is normal that any interpretation first rely upon the expression of the text. Still a duality of means is offered. The judge may at first analyze the expression taken by itself and proceed by means of what one traditionally calls a "grammatical interpretation"; but he may also, in proceeding by way of "logical interpretation," consider the expression rationally and in its relationship to other provisions of positive law.

"Grammatical interpretation" constitutes in all cases the point of departure of the task of the judge.[46] Its object is to determine the meaning of the text with the aid of language usage and rules of syntax. As it has been said, it involves "the search for what the terms [of the statute] signify or may signify in themselves, in an objective fashion, outside of any search for the drafter's intent and of any consideration of social utility or moral justification, foreign to the letter of the text under consideration."[47] The terms themselves are to be taken in their juridical sense, not in that of everyday language. Very often, grammatical interpretation provides the judge with the key to the text. But it is not always so, to the extent that certain terms may have several meanings. For example, the phrase "third parties" [*tiers*] sometimes denotes persons absolutely strangers to a contract, *i.e.*, the *penitus extranei*; sometimes they denote only certain

45. The Louisiana Civil Code, for example, contains many articles, *see* LA. CIV. CODE arts. 13-21, devoted to "the application and the construction of laws." *See* the text of these articles in Barham, *supra* note 21, at 797 n.79.

46. *See* C. AUBRY ET C. RAU, *supra* note 4, at n° 170; G. BAUDRY-LACANTINERIE ET M. HOUQUES-FOURCADE, *supra* note 14, at n^{O} 259; 1 R. DAVID, LE DROIT FRANÇAIS—LES DONNÉES FONDAMENTALES DU DROIT FRANÇARS, 140 (1960); F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF n^{OS} 101-102 (1954).

47. R. DAVID, *supra* note 46.

assigns or unsecured creditors of contracting parties. Similarly, the word "act" [*acte*] denotes at times the *negotium*, at another time the *instrumentum*. It is necessary, therefore, to supplement grammatical interpretation with "logical interpretation."

"Logical interpretation" consists of applying to the obscure text the multiple resources of juridical reasoning.[48] At times, reasoning is applied to the text taken in isolation; at other times, reasoning encompasses a second text and even several texts.

The most characteristic example of reasoning applied to the text considered as an entity is that of reasoning a contrario. This reasoning consists of turning around the statement of a text in order to draw a new inference therefrom and is, therefore, founded on the premise that if a text asserts something, it is supposed to negate the contrary. Judges often resort to argument a contrario, without explaining, moreover, the reasons for choosing this type of argument. Two well known illustrations are found in the law of filiation.

Article 336 of the *Code civil*, relative to acknowledgment of an illegitimate child, provides that "[r]ecognition by the father, without indication of avowal by the mother, is effective only with regard to the father." As it is drafted, the text, which sanctions the purely individual effect of acknowledgment, is troublesome in its result; often, the father who acknowledges the child believes that this proves the two filiations, paternal and maternal. Sharing the same belief, the mother deems it useless to proceed herself with an acknowledgment; so maternal acknowledgment is not established. Therefore, a more-than-a-century-old jurisprudence of the *Cour de cassation*,[49] using reasoning a contrario, has adopted a different interpretation of article 336. The Court infers from the text that the father's acknowledgment, when giving the identity of the mother and stating that she recognizes the child, produces an effect toward her. The solution is all the more interesting in that the avowal of the mother need not be express but may equally be tacit; it may result, for example, from the fact that the mother brings up the child as her own. Incontestably, recourse to reasoning a contrario is implicitly justified by the result to be attained.

More recently, another provision of the *Code civil* relative to acknowledgment of an illegitimate has been the subject of analogous reasoning. Article 334(9) provides that "[a]ny recognition is void, and any petition for investigation is non receivable, when the child has a

48. *See* C. PERELMAN, *supra* note 27, at n° 33.

49. *See, e.g.*, Judgment of 29 juin 1939, Cass. civ., S.1940.1.121; Judgment of 25 nov. 1913, Cass. civ., S.1914.1.95; Judgment of 25 juin 1877, Cass. civ., D.P.1878.1.262, S.1878.1.217; Judgment of 7 jan. 1852, Cass. civ., D.P.1852.1.75, S.1852.1.12.

legitimate filiation already established by possession of status." Interpretation of this text has given rise to an important controversy: the point debated was the determination of whether the child having only a legal document (birth certificate) to establish his legitimacy, without the corresponding possession of status, could have his illegitimate filiation established. One could, in effect, reason by analogy and say that, the document being one of the modes of establishment of legitimate filiation, the prohibition of article 334(9) was equally valid for the case where the child had but *one* claim to legitimacy. But one could also reason a contrario and consider that, since the text only prohibits the establishment of illegitimate filiation if the child enjoys the possession of the status of a legitimate child, this filiation may be validly established when the child has only one claim of legitimacy. Such was finally the interpretation adopted by the *Cour de cassation.*[50] Recourse to reasoning a contrario is explained herein, even though the *Cour de cassation* did not supply any indication by *ratio legis.* In fact, the statute of January 3, 1972, was intended to favor the role of possession of status in the matter of filiation by extension of its traditional consequences.[51]

A second form of logical interpretation consists in regarding the legislative provisions in question no longer in isolation, but rather in relation to the other rules of positive law.[52] In placing the obscure text in context, the text's meaning becomes more readily apparent. For example, article 1321 of the *Code civil* provides that "[c]ounterletters are effective only between the contracting parties; they are not effective as against third parties." The meaning of the phrase "third parties" [*tiers*] is derived from a comparison to article 1165, which lays down the principle of the relative effect of agreements; the third parties alluded to by this latter text are those persons absolutely strangers to the contract, *i.e.*, the *penitus extranei.* Those third parties alluded to by article 1321 cannot be the same; otherwise, the provision would be divested of all interest. Thus, the jurisprudence decided that the third parties of article 1321 are those who have an action by particular title and the unsecured creditors of contracting parties.

The text to be interpreted is often viewed in relation to general principles of law, whose belonging to the order of positive law cannot be denied.[53] In the civil law, these principles frequently, but not

50. Judgment of 9 juin 1976, Cass. civ., D.1976.1.593 note Raynaud; Cornu, *Observations,* J.C.P.1976.2.18494.

51. *See* C. COLOMBET, J. FOYER, D. HUET-WEILLER ET C. LABRUSSE-RIOU, LA FILIATION LÉGITIME ET NATURELLE n^{os} 147-55 (2d ed. 1977).

52. *See* Batiffol, *supra* note 16, at 12, 26.

53. *See* J. GHESTIN ET G. GOUBEAUX, *supra* note 7, at n^{os} 446-52 and authorities cited therein.

exclusively, take the form of maxims and adages borrowed from learned custom; for example, *accessorium sequitur principale, nemo auditur propriam turpitudinem allegans, contra non valentem agere non currit praescriptio.* Indeed, in the majority of these cases, these principles serve to fill in legislative gaps; it is essentially on this ground that their role has been viewed. Their function, however, is broader in that the principles constitute a means of interpretation of new statutes "which will thus be integrated into the juridical order, and reconciled with it."[54]

Grammatical interpretation and logical interpretation applied to the wording of the text do not constitute, however, the only instruments utilized by the judge. Another element which plays a primary role is the "purpose of the rule."

The Purpose of the Rule

All written norms are necessarily decreed with a view toward a determined purpose, knowledge of which serves as a guide for the judge's interpretation. The goal of a statute or a regulation may be discovered either in the intent of the drafter or by looking at the social objectives which the statute was designed to accomplish.

Interpretation founded on the "search for legislative intent" speaks to the idea that each text reflects the particular concerns of its drafter and that it then must be interpreted such that the adopted solution corresponds to this intent. This is a characteristic method of the "school of exegesis" which enjoyed an immense success during the course of the 19th century before being denounced by writers such as Saleilles and Gény.[55] It was contended that such a method led to sterilizing the law, to the extent that the legislative will to be considered is the one which prevailed during the preparation of the statute. Applied to the Civil Code of 1804, this criticism was undoubtedly valid; today one no longer asserts that a text of the Code should be interpreted exclusively in light of the ideas that motivated the legislator 175 years ago. But that, in no way, signifies that the method need be rejected outright. It is, in effect, justified each time the judge finds himself confronted with a new text. Thus, the search for the legislative intent remains a constant of interpretation.[56]

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54. *Id.* at n° 452.

55. On the method of the school of exegesis, *see* F. GÉNY, *supra* note 46, at n^{os} 12-19; Perelman, *supra* note 27, at n^{os} 16-30. For a critical review, *see* F. GÉNY, *supra* note 46, at n^{os} 33-34; Husson, *Analyse critique de la méthode* de l'exégèse, *in* 17 ARCHIVES DE PHILOSOPHIE DU DROIT 115 (1972).

56. *See* R. DAVID, *supra* note 46, at 143: "[N]umerous court decisions indicate that this mode of interpretation is often practiced in France." *See also* J. GHESTIN ET G. GOUBEAUX, *supra* note 7, at n° 160, where the authors, speaking of recent reforms in

This intent is found essentially in the preparatory works, the importance of which for the interpretation of laws has been recently stressed.[57] Indeed, it frequently occurs that the lower courts refer to these works. It is necessary, however, to be conscious of the inherent limits of these documents. On the one hand, only the preparatory works of the statutes *per se* are published, but not the preparatory works of the regulations.[58] On the other hand, even for statutes, one must be careful not to rely solely on the preparatory works, especially when one considers the imprecision, indeed the contradiction, inherent in parliamentary debates which do not always allow disclosure of the deep, underlying intent.

Another type of document has recently assumed a predominant position. It is the ministerial responses to written questions of parliamentarians. To the extent that most of the statutes for reforming the civil law and the commercial law have been adopted at the initiative of the government, the proposals prepared by the ministers concerned—especially those prepared by the Ministry of Justice—and the responses given to the questions of the parliamentarians may effectively reflect the intent of the drafters. However, it is important for all concerned to proceed with caution here; for one is actually dealing here with governmental interpretation which, as shown by a brilliant study, often translates "the desire . . . of breaking away from the intent of the legislator."[59] One would, therefore, be going too far by considering ministerial responses to reflect the thinking which motivated the legislator. Nevertheless, their influence on judicial interpretation is still certain.[60]

The search for legislative intent is only a defensible method of interpretation if the text is recent. When, on the contrary, old statutes are involved, and in particular Napoleonic codifications, the purpose of the rule is no longer discovered in the drafters' intent, but in the social objectives of the legal provision.

Interpretation founded on the "objectives of the rule" is based on the idea that "the meaning of the statute changes with time, because it is destined to be applied to conditions existing today, and

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family law, likewise write: "The search for legislative intent by the exegetical method regains all its significance. In particular, recourse to preparatory works, previously so severely frowned upon, regains a legitimacy which the practive had moreover never denied it."

57. Couderc, *Les travaux préparatoires de la loi ou la remontée des enfers*, D.1975.Chron.249.

58. In fact, the report which sometimes precedes the text of certain decrees is but a summary analysis.

59. Oppetit, *supra* note 8, at 107-09.

60. *See* the numerous examples cited by Oppetit, *supra* note 8, at 109-10.

not to those existing in the more distant past."[61] The text must then be interpreted in relation to the needs of society prevailing at the time of the interpretation.

Undoubtedly, one would search in vain for a jurisprudential decision which, in its rationale, refers to such a method of interpretation. It is recognized that whenever judges, especially those of the *Cour de cassation*, have adapted obsolete statutes to modern needs,[62] they have done so implicitly by this method. The first example deals with the notion of "public order and good morals," to which article 6 of the *Code civil* refers. The significance which the jurisprudence of today attaches to that notion is very different from that of the nineteenth century. While the concept of "public order" has been broadened, notably by the creation of an "economic public order,"[63] the concept of "good morals" has been narrowed.[64] The wording of article 6 has remained that of the *Code Napoleon* of 1804, but its content has been adapted to new needs. The second example refers to the evolution of the law of delictual liability. Although articles 1382 to 1386 of the *Code civil* have, by and large, remained unchanged, their import has been modernized. The jurisprudence has in particular created a general system of liability for the acts of things, a system which the drafters of the Code had never considered. This creation was achieved by interpretation of the insignificant statement of article 1384(1), which the *Cour de cassation* isolated and on which the Court built a truly new theory. Other examples could be cited which demonstrate that the meaning of the text is fixed in relation to its social objectives. It is necessary, however, to add that this method of interpretation, described as "teleological," is more often resorted to by the *Court de cassation* than by the lower courts.[65]

Thus, a plurality of techniques is available to the courts for determining the meaning of a written rule. As Carbonnier pointed out: "[T]he jurisprudence today practices a tactical eclecticism in its method of interpretation."[66] At the point of departure, whatever be the text, the interpretation thereof is always grammatical; but,

61. R. DAVID, *supra* note 46, at 143-44.

62. For a critique of this notion, *see* Atias et Linotte, *Le mythe de l'adaptation du droit au fait*, D.1977.Chron.251.

63. *See* G. FARJAT, L'ORDRE PUBLIC ÉCONOMIQUE (1963).

64. For instance, in the nineteenth century, jurisprudence would consider "matchmaker" agreements as immoral.

65. *See* R. DAVID, *supra* note 46, at 147, who speaks of "the most extensive use of the teleological method of interpretation when one considers the judges of higher courts [*Cour de cassation, Conseil d'Etat*], more prepared to assume responsibilities than the lower courts in the hierarchy."

66. J. CARBONNIER, *supra* note 16, at 178 n° 39.

when a problem arises, or simply when he wishes to strengthen the solution drawn from the grammatical interpretation, the judge has recourse to logical interpretation or to the search for the original intent of the legislator. It is only when the text is outdated that the courts indulge in the application of the evolutive or teleological method. In reality, although judges often deny it, one has the impression that the choice of method(s) used is a function of the result sought.[67] This would explain in particular why, with respect to interpretation of a text, a term is taken in a new light which in no way corresponds to its usual meaning; this would also explain why the import of a rule is fixed with the aid of reasoning a contrario, while reasoning by analogy would be just as acceptable. Indeed, no formal proof of this assertion is possible; for it is excessively rare that a decision openly scans the practical consequences of the conceivable solutions.[68] It remains, however, that many interpretations can be explained only by the search for a result considered to be more just or more equitable.[69]

CONCLUSION

The solution that can be suggested to the problems of interpretation are far from being satisfactory to a mind concerned with certainty. Unfortunately, the developments are evidence of that fact; and, from an intellectual viewpoint, one has grounds for disappointment. Still, one must make distinctions. What is troublesome is the haziness hovering over the field of interpretation, the lack of a precise criterion to determine the clarity of a text. On the other hand, with respect to the methods of interpretation, it is normal to leave to the judge a wide latitude and not to impose on him the "straight jacket" of a given method. Law will never be an exact science; and, when confronted with a text, a judge will never have his choice confined by a theorem.

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67. *See* Boulanger, *supra* note 20, at 354, citing Charles Eisenmann's contention that the judge begins by choosing the decision he considers the most just. It is then that he devises a reasoning to justify his solution. But First President Fremicourt of the *Cour de cassation* protested against the use of this theory, *id.* at 553, as also did President Ancel, *id.* at 534.

68. *See* Touffait et Tunc, *supra* note 21, at n° 11.

69. *See* Agostini, *L'équité*, D.1978.Chron.7.